VIRGINIA
LAW REVIEW

VOL. VIII. MARCH, 1922 No. 5

A STUDY OF RIGHTS INCIDENT TO REALTY.*

II. THE GROWTH OF LIMITATIONS UPON PROPERTY RIGHTS.

ON THE most cursory inspection it will appear that most classifications are superficial. If distinction in kind be made between the classes the distinctions are likely to prove accidental, and the principles sought to be distinguished in fact overlap; if the distinctions be based on degrees of difference, they serve only to draw attention to the extremities to which the concrete instances of rights may go.

Thus in the preceding chart we see that total ownership, implying unlimited power over the property or *res* considered, necessarily conflicts with the class of rights and their corresponding obligations classed as uncertain interests conferred and imposed by law, and which in themselves must be recognized as partial ownership. We also see that the conception of total ownership involving the right to do what one will with the entire interest, the whole bundle of rights, differs only in degree from the conception of partial ownership, as a servitude, involving the right of power of control over a part of the entire interest, one of the bundle of rights.

And yet even the civil jurists endeavored to make distinctions in kind between these rights. Those rights to property which constituted ownership or dominion were classed as absolute rights, rights *in rem;* those rights in the property of another, *jura in re aliena* as servitudes, were called relative rights. By relative rights were meant rights which were accompanied by corresponding duties, for the right of the servitude or easement, might be considered conversely as a duty by the land over which

*Continued from 7 Va. Law Review 327.

the servitude lay;[1] and in that light there was found an adequate basis of distinction, for the servient tenement owed an obligation or duty to the owner of the dominant tenement, whereas the dominant tenement owed no obligation to anyone. But it will be seen that the distinction is accidental; for if the owner's rights to the dominant tenement or to any piece of property are considered in the abstract as absolute rights *in rem,* why should not the ownership in a servitude be also considered in the abstract as absolute ownership *in rem* to that extent?

And so we have seen that Savigny in classifying the rights under the Roman Law (Possession Bk. 1 sec. 14) considered servitudes as detached portions of property as opposed to property itself comprehending the totality of all real rights, thereby taking one horn of the dilemma; whereas Brown (Limitations Bk. 11, p. 68) in classifying the rights under the Common Law, takes the other horn of the dilemma, and considers possession (which for the classification in question is synonymous with ownership) as an obligation, that is to say a relative right. And yet notwithstanding this inconsistency a classification based upon such a distinction has been made by all jurists and it must therefore be recognized, although at the same time it may be said that this classification is accidental, and without careful explanation would be misleading.

When we consider the idea of dominion over a piece of property as an absolute right, we consider the property as not encumbered by any obligations or rather limitations upon the control of it by its owner; and it is true that the usual methods of enjoying a piece of property, particularly a large piece of property,—to build upon it, to cultivate it in the ordinary ways, even to dig upon it,—are unrestricted by law, so that the owner has the absolute right to do those things as he may choose. But the moment the owner attempts to use the property in an extraordinary way, as to build up a slaughtering house, or a powder magazine upon it, if the place is not in the judgment of the courts a proper place for those industries to be pursued, the owner will be prevented by law from so using the property, and

[1] See C. C. LANGDELL, A BRIEF SURVEY OF EQUITY JURISDICTION, p. 1.

his dominion is no longer complete. But the right of the owners of the adjoining property to prevent such extraordinary uses has not been called a relative right.

Again the land encumbered by an easement is said to owe a duty to the land the owner of which enjoys the easement, and the right to the easement is called a relative right. But the fact that the owner of the servient tenement has his rights of enjoyment of his land diminished by the easement does not prevent his enjoyment of other rights, as absolute rights. So that it is apparent that absolute rights in land are not incompatible with the existence of obligations which are towards other land relative rights.[2] And it is further apparent that no land may be the subject of absolute rights without being at the same time the subject of some obligations towards the owners or proprietors of adjoining land which do not differ in kind from what are recognized as *jura in re aliena*, or relative rights.

We therefore conclude that no ownership of property is unlimited, but that all property rights are limited just as all personal rights are limited on account of the fact that no enjoyment of property is allowable which is not a reasonable enjoyment under the circumstances in which it is attempted; and that every use or method of enjoyment which would be forbidden by law is just as distinctly a restriction upon the dominion over the particular property as an easement or covenant imposed by acts of the parties.

The fact that population was generally sparse in the early period of law and that ownership of land was not so divided up as to put different owners in close contact, and the probably more important fact that diversity of occupation was not very great, all present themselves as reasons why this principle of classification was not recognized by early jurists. Only the conspicuous examples of limitations upon the full enjoyment of property were recognized in primitive law. If one landowner

[2] Cf. AUSTIN, JURISPRUDENCE LECTURE XLIX. "For the same reason a right of servitude is styled by Mr. Bentham a fractional right: (BENTHAM, LEGISLATION, p. 251) that is to say, a definite right of user, subtracted or broken off from the indefinite right of user which resides in him or them who bear the dominion of the subject."

And see Code Civil *expliqué* by J. A. Rogron, V. 1, p. 241.

was seen exercising over the property of his neighbor some of the important prerogatives of ownership though not claiming them all, that fact was generally known, and in time became recognized as a right, which in time received at the hands of the lawyers a name, in the Roman Law that of usufruct or servitude, in our law that of profit or easement according to the distinctions to which history gave rise.

If the privilege or encroachment were exercised by all the inhabitants of the vicinage, it became recognized as a lawful custom or a right based upon prescription. If the obligations were a burden to do something assumed by the particular landowner, even that could be recognized in due time. In time the power of persons to create obligations by agreement arose and was exercised, and further on in certain cases grants came to be presumed. But all these instances of obligations or limitations upon property were glaring. It required no inspection to recognize these. No others were apparent to destroy the completeness of a classification of property into that restricted and that unrestricted, that servient and that dominant, and the corresponding classification of property rights into those relative and those absolute.

And that brings us to the further consideration of a phenomenon of early law already referred to in the preceding article [3] which had much to do with the defective classification of rights by jurists and which on first thought would appear a great obstacle to keeping to the classification we are attempting to follow. It is the notion that pieces of land owned or owed duties to one another like persons; and the conception undoubtedly occurred very early, and is deeply imbedded in the law. Where certain rights were recognized as acquired by one person or body of persons occupying one piece of land over another piece of land, the two pieces were personified, and the assumption was made that the one piece of land owned the other. The origin of this is difficult to trace. It is needless to say that it preceded the date of recognition of grants of incorporeal hereditaments; for that was well down into modern law. If it were peculiar to the Common Law, we should expect to find its

[3] 7 VA. LAW REVIEW, 327.

rise in the custom of recognizing rights gained by the user of a large number of people on a particular domain, where the number was too great for each one to acquire a recognizable interest. But searching in this direction is to no purpose, for we find the same conception among the civilians.

Azo of Bologna spoke of land being subject to land just as one man is the slave of another man. So we find it all through the Roman Law, and see that its origin is lost in antiquity. Thus Professor Langdell tells us of it in discussing the subject of real obligations in his Brief Survey of Equity Jurisdiction.[4] "A real obligation is undoubtedly a legal fiction. . . . The invention consists primarily in personifying an inanimate thing, and giving it, so far as practicable, the legal qualities of a human being. The invention was originally made by the Romans, and it has been borrowed from them by the nations which have succeeded them." And again, page 222, "It was by means of this that one person acquired rights in things belonging to others (*jura in rebus alienis*). Such rights were called servitudes (i. e. states of slavery) in respect to the thing upon which the obligation was imposed, and they included every right which one could have in a thing short of owning it. These servitudes were divided into real and personal servitudes, being called real when the obligee as well as the obligor, i. e., the master (*dominus*) as well as the slave (*servus*) was a thing, and personal when the obligee was a person. The former, which may be termed servitudes proper, have passed into our law under the names of easements and profits *à prendre*."

Mr. Justice Holmes, traced the origin well back into the formative period of the fiction. But he concludes that although the notion that the land owned rights over other land, was accepted by the ancients, it was never accepted as a principle; for a disseisor's use of a way was never added to that of the disseised owner to aid in establishing an easement. So he says[5] "The language of the law of easements was built up out of similes drawn from persons at a time when *noxae deditio* was still familiar; and then, as often happens, language reacted upon

[4] LANGDELL, p. 392.

[5] HOLMES, THE COMMON LAW, p. 382.

thought, so that conclusions were drawn as to the rights themselves from the terms in which they happened to be expressed. When one estate was said to be enslaved to another, or a right of way was said to be a quality or incident of a neighboring piece of land, men's minds were not alert to see that these phrases were only so many personifying metaphors, which explained nothing unless the figure of speech was true."

So Mr. Austin concludes that there is no sufficient reason why an easement in gross, or a personal servitude, should not be as completely alienable as an easement proper, or real servitude.[6] If an easement could be granted or acquired by a person as owner of Blackacre, and be assignable as appurtenant to Blackacre, why could not an easement in gross which might be granted to another person as a personal right apart from any ownership of Blackacre, be assigned by him to a third person to make a personal use of it? Mr. Austin thinks that the fact that it could not be so assigned is attributable to accidental and defective reasoning of the Roman lawyers.

All this is very interesting. But with all recognition of the logic in Mr. Austin's inquiry and with all respect to the depth of Mr. Justice Holmes' historical investigation, these very inconsistencies which they point out, accomplish the harmonious adaptation of the law to the theory that the title to a piece of land must be regarded, as a bundle of rights. Of course it is not for a moment to be contended that the ancients ever dreamed of that theory. But let it be admitted at present, nevertheless, that the unalienability of easements in gross in the Roman Law as well as in the Common Law is an evidence of the common sense that will be found to characterize all legal systems however ancient.

And the cause for wonder is that the fact, though apparently accidental so far as it concerns any classification of rights even by the Roman lawyers, will be found essential to any practical theory of real property law which may be followed today. If A, the owner and occupier of Blackacre is to be considered for the purpose of scientific theorization as the holder of a bundle of rights the sum total of which constitute all the forms of enjoyment

[6] AUSTIN, JURISPRUDENCE LECTURE L, vol. 3, p. 36.

which constitute the title to Blackacre; the addition to the bundle of one or more of the forms of enjoyment or rights of which inheres in Whiteacre which is adjoining, cannot effect the conception of ownership or possession one way or the other; the conception is reasonable and perfectly scientific. But to hold that the rights which A so holds over Whiteacre as soon as once acquired by him are separately alienable and realienable at will compels us also to hold that A might alien separably any number of the rights to which he is entitled as the owner of Blackacre itself. The mere fact that the added rights taken from Whiteacre have been abstracted from the total which constitute the title to Whiteacre is not a good reason why they should be any more alienable than some of A's rights in Blackacre.

But it is unnecessary to go further than to point out that to allow A separately to alien in gross and to allow his several alienees to realien any number of the rights which together constitute the title to Blackacre would be productive of hopeless confusion. Hence it is fortunate for theories of law that the common sense of the ancients asserted itself and held that personal servitudes or easements in gross were totally unassignable.

But that brings us to the question, what is an easement in gross? that is to say, which of the rights which make up the title to a piece of land, when severed and granted to the owner of another piece of land, will attach to those rights and give rise to a dominant and servient tenements and which will remain in the person of the grantee as easements in gross?

Mr. Austin has given us a thorough discussion of the distinction between real and personal servitudes, as these terms are used by the civilians. A servitude or easement over a certain piece of land is said to be real when it may be enjoyed by the owner of another certain piece of land merely because he is owner of the land, and without regard to whether he is first or subsequent enjoyer of the easement. Whereas an easement is personal when the person who enjoys it derives his right to do so from his personality and not from his ownership of any par-

ticular land.[7] He explains that all servitudes are in fact necessarily obligations by real property, and that although the term servitude came to be applied by the Roman lawyers as well as by the modern civilians to all special obligations imposed upon land, whether of the kind which might be enjoyed personally or of the kind enjoyed by owners of other lands as such. Yet in all probability the old Roman lawyers made a distinction. The rights of enjoyment which broadly comprehended usufructs under the Roman law, apparently as well those unlimited in quantity as those limited were classed as personal or improper servitudes, being well adapted to enjoyment by any person regardless of his land ownership. Whereas those rights over property which were adapted to be enjoyed by the owners of other property as such, were probably regarded as servitudes proper.

These distinctions are more difficult to make in terms of the Common Law, because the term "usufruct" necessarily embraces not only rents in kind, but also many rights which are called profits in our law, whereas proper servitudes would not be limited to easements, but would also include many profits, as commons, that are peculiarly valuable to owners of particular lands as such.

But the historical distinction pointed out by Mr. Austin between servitudes proper and improper, will appear sufficiently clear to the student of the Common Law for him to see that those property rights alone could be made servitudes proper and therefore easements which were capable of being fully enjoyed by the owner of some other piece of land as such. The word owner is used in the broad sense of possessor without regard to the legal effect of the possession. Indeed with the exception of rents and annuities there are very few usufructs or profits known to the Common Law which the lawyers have ever had occasion to consider as grantable in gross.

It would seem therefore that if Mr. Austin had continued his reflections one step further the actual principle upon which the early lawyers acted, whether they recognized the principle or not, would have been at once apparent. The power to sever

[7] *Ibid* p. 37.

the totality of rights which comprise ownership of real property is limited to the cutting off or severence of those rights the enjoyment of which, in the wording of the common lawyers, touches or concerns the land to be benefited by the severed right.

Or in other words, servitudes proper are *jura in re aliena* which directly concern or can be made to benefit the tenements to which they are attached. If this limit is arbitary it is the safe limit of common sense necessary to be made upon all theory. In terms more pleasing to theorists it is the limit of degree. And against it may be seen that but for this common sense limit in the early lawyers, whether Roman or English, the establishment of a theory of real property law would be impossible.

The accuracy of the generalization that all established and recognized easements touch or concern the dominant tenement, is assumed because no example has been found by the author which is not included in this generalization; unless indeed certain spurious easements or customs to be found in the early cases are classed as easements, e. g., the duty of the owner of the servient tenement to provide a bull and a boar for the use of the parish, which will be discussed later. But on a moment's reflection it must be realized that the occasion to create servitudes in favor of any but neighboring land owners must rarely have arisen. And moreover the early birth of the idea of personifying the dominant and servient tenements tended in itself to eliminate almost all other servitudes from the law before the records which have come down to us; for the dominant tenement could hardly be regarded as master of another tenement which was not in a position to serve it.

No attempt at a comprehensive list of easements recognized in the common law has ever been made. The early lawyers even down to Blackstone as has been shown, underestimated the importance of this form of property right; and the later writers upon easements wrote after the day when such accidental lists of the forms of law were deemed important. But the later writers upon the subject of easements, and indeed some of the early ones, have given us the result of their investigations embodied in definitions of easements. And an inspection of these

definitions corroborates the limitations above made. Probably the most scholarly works upon the subject are those of Mr. Gale and Mr. Goddard; and Mr. Gale defines an easement as: "A privilege without profit, which the owner of one neighboring tenement hath of another, existing in respect of their several tenements, by which the servient owner is obliged 'to suffer or not to do' something on his own land, for the advantage of the dominant order." [8]

While Mr. Goddard corroborates him by defining easements thus, "An easement is a privilege, without profit, which the owner of one tenement has a right to enjoy in respect of that tenement in or over the tenement of another person, by reason whereof the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former." [9] And both writers are filling out the definition found in Termes de la Ley, which may be translated from the Norman French as folows:—"An easement is a prior privilege that one neighbor hath of another by writing or prescription, without profit; as a way or sink through his land, or such like." [10]

In the writers upon the Roman Law, however, repeated lists of servitudes may be found, as would be expected from the early codification of that system, Justinian even divided them into urban and rural servitudes, listing them separately. The former, he names in the Institutes [11] as the obligation to support the weight of the neighboring building; to allow a neighbor to insert a beam into the wall, the obligation to receive or not to receive the dripping or flow of water falling upon one's roofs or areaways, or into one's drains, the right to forbid the raising of a neighboring building, and to preserve lights. So he gives as rural servitudes, passage way, deadway, drift way and the right to lay aqueducts; adding that others also class with them the right to draw water for flocks, the right of pasturage, the right of quarrying stone, and the right of digging sand. But of course these servitudes were given merely as examples; for the

[8] GALE, EASEMENTS (7th. ed.), p. 6.

[9] GODDARD, EASEMENTS (5th. ed.), p. 2.

[10] TERMES DE LA LEY, p. 187, tit. Easements.

[11] INSTITUTES, Lib. 11. Tit. III, DE SERVITUTIBUS, Text of C. M. Galisset, Paris, 1867.

same list is given in the Digest with slight additions, together with the remark that these and others of a similar nature constitute the respective classes.[12]

So Puffendorf,[13] practically following Justinian's Digest, lists the service of city estates as,—"The service of bearing burden, by which any neighbor is bound to let my house rest upon his wall or pillar; the service of letting in a beam, the service of jutting or shooting out the service of raising a building higher, the service of not raising a building higher, the service of lights, the service of not hindering lights, the service of a prospect, the service of dropping water, the service of not receiving dropping water, the service of receiving the flow of water, the service of not deflecting the flow of water, the service of employing sinks and kennels, of pouring out anything on neighboring ground, and whatever there are besides of the same kind." As rural service, he recites those in the institutes, adding only the right of burning lime.

Voet,[14] goes over all these servitudes given by the Digest, commenting on them very fully, but reaches no suggestion that there were any others of the same kind commonly met with; so that it may be assumed that the lists given above are practically complete so far as the books show.

Many of these servitudes are profits *à prendre* in the Comman Law, but it will be seen that even the profits touch and concern the dominant tenement in that they enlarge its enjoyment. Therefore we conclude, first, that so far as servitudes and easements are concerned, so far as their existence as rights in either the Roman Law or the Common Law involves their classification in forming a theory of property rights, their existence presents no objection to the theory that the title to each piece of property constitutes a bundle of rights, all servitudes and easements being but certain of the rights inhering in the burdened property, abstracted from the total.

Secondly, we conclude that the chief limitation upon servitudes and easements, that when once created, or abstracted from the bundle of rights inhering in a given piece of property,

[12] DIGEST, Lib. VIII, Tit. I, 1, and Tit. II, 2, and Tit. III, 1 & 2.
[13] PUFFENDORF LAWS OF NATURE AND NATIONS, Bk. IV, C, VIII.
[14] COMMENTARIES AD PANDECTAS, Part II, Servitudes.

they cannot be assigned as several rights, is in keeping with the theory and induces the corollary that the law regards property rights only when grouped in a bundle. Or to speak more fully, the law will not preserve a severed property right, a mere mode of enjoyment of property, longer than the life of the enjoyer. Whether an easement in gross or a personal servitude is in fact real property or personal property is of course immaterial, so long as the fact remains that it is a mere personal right dying with the person.[15] And it is at once apparent that this corollary would be a necessary adjunct to the theory, even if the ancient law had not developed; for if every mode of enjoyment of property could be severed and assigned, the extent of confusion could hardly be conceived, to say nothing of its being remedied.

Thirdly, we conclude that the limitation upon servitudes and easements, that those granted to the owners thereof, (unless actually intended as personal rights for life of the grantee only) become the property of the land benefited, rather than of the benefited person, is perfectly in accord with theory and is only a different way of saying that the severed right merely becomes another of the bundle of rights which constitute the title to the land to which the easement or servitude attached, and that by so doing the severed right may be preserved.[16]

---

[15] There may be some doubt whether improper servitudes or usufructs under the Roman Law were grantable to a man and his heirs, or to a man for his life only, as in the Common Law. Austin thinks they were so grantable. See Lecture 50, vol. III, p. 36, although citing, *contra*, MAKELDAY, vol. II, pp. 79-80. Yet the recognition of the right of the heir would mean nothing. The recognition of course dates back to the time when the heir and the ancestor were conceived in the law as the same person. For an elaboration upon the identity of ancestor and heir, see HOLMES, COMMON LAW LECTURE X; POLLOCK & MAITLAND, HISTORY OF EARLY ENGLISH LAW, vol. II, pp. 251-3; SIMS, COVENANTS, p. 36.

In the Roman Law the heir's servitude may have been a new right however—MAKELDAY, § 315.

This citation from Makelday is to the German edition of his HAND BOOK ON ROMAN LAW. In the English Translation, Philadelphia, 1883, 2 Vols. in one, the reference is evidently to § 305.

So the Roman Law required a servitude to touch or concern the dominant land. MAKELDAY, § 315.

[16] It will be recognized that this idea reconciles the apparent conflict between fact and theory which caused Mr. Justice Holmes to

And fourthly, we conclude that the fact that all established easements and servitudes which we find appurtenant to or attached to dominant tenements, are in nature beneficial to the dominant tenements and are owed by servient tenements in near proximity to them, is a necessary support of theory in setting safe limits to the severance of rights. For rights cannot be severed from one bundle or piece of property in which they inhere to be united to another, unless the pieces of property are in immediate physical proximity if not actual contact.

Harmony between theory and existing law having been established in the case of servitudes, let examination now be made of other real property rights, and although not in the order of arrangement shown in the table,[17] the property rights next suggested in the present connection are covenants that run with land, for the reason that they are believed by many scholars, notably Mr. Justice Holmes, to have their origin in certain supposed servitudes or easements.

It is impossible here to go into the question of what is the origin of covenants which run with land. The mere statement of the arguments for and against their origin in certain supposed easements would require many pages. Suffice it to say that these easements so called, from which running covenants are supposed to have originated, were obligations apparently imposed upon the servient tenements to do something for the benefit of the dominant tenement. The early cases involved the

---

conclude that land was not always a slave to land, because a disseisor's use of a way was never added to that of a disseised owner. (HOLMES, THE COMMON LAW, p. 382.) It must be remembered that the principle is not the idea of the land being active in acquiring the easement, but that the easement after it is created becomes the slave of the land. The personification did not arise until the rights of servitude arose. Otherwise it would have offended another principle of the early law that identity of persons was recognized only in lawful successors. The reason why a son's or assignee's use of a way in continuance of that of his father or predecessor eventually created a right or servitude was because the law considered them the same person. But the disseisor was never the same person. So the servitude never arose. If the servitude had arisen, however, before the disseisin, then the disseisor got the servitude as well as the land. All these facts are fully set out in the same chapter of HOLMES'S COMMON LAW, but Mr. Justice Holmes did not carry his conclusions out to their finality.

[17] See 7 VIRGINIA LAW REVIEW, p. 341.

duty to provide singing in a neighboring chapel,[18] the duty to provide a bull and a boar for the benefit of the parish,[19] and one or two other services. And there are clearly established servitudes of the duty of fence, and the duty upon the owner of lower stories to repair the roofs. Some of the cases appear to have allowed the duty to be enforced by actions of covenant; although it is doubtful what was the nature of the particular obligations considered. The author has endeavored in another essay to array the argument tending to show that they were not identical with covenants,[20] and a very full and scholarly presentation of the arguments that they were identical with covenants may be found in the fourteenth and fifteenth chapters of Mr. Justice Holmes' work on the Common Law. The parties in the cases are reported as calling the obligations customs running from time immemorial, and if that were true, the existence of such curious customs do not affect the present theory. As such they cannot be numbered among the modes of enjoyment of the servient tenement transferred to the owner of the dominant tenement: but at most are duties imposed upon the owner of the servient tenement as such.

And if covenants did derive their capacity to run with land from such early customs, then covenants made today are merely obligations created by act of the parties, and if they be covenants to do something, merely add artificially to the natural modes of enjoyment inhering in the servient tenement.

But on further reflection it will appear that covenants to do something on the servient tenement, active covenants, as they may be called, are not the only obligation of their kind that the early lawyers recognized. Rent, in all its forms, involves an essentially active obligation by the burdened land; and that is especially true when the rent is reserved in kind. It involves the tenant's raising a crop of a particular kind. So that the transition from raising a crop of wheat or a flock of sheep and paying part of the yield to the landlord, to keeping the male animal so that the landlord or his other tenants can raise their own

[18] Pakenham's Case, Y. B., 42 E. III, 3.
[19] HORNE'S CASE, Y. B., 2 H. IV, 6.
[20] SIMS, COVENANTS THAT RUN WITH LAND, Chapter III.

flocks, is very slight. Apparently no historical data of such a transition have been found, but the principle is clearly enough defined to let us see that there is nothing so wonderful in the nature of active easements or covenants. Indeed we are fortunate in having them as a surviving connection between easements and the obligations incident to tenure. But we have to thank the common sense of the early common lawyers again for sooner or later deciding that these new limitations upon the enjoyment of property cannot be created and preserved in gross, but must run with the land benefited and must touch and concern it.[21] Therefore, although all active obligations are essentially artificial additions to the natural modes of enjoyment which go to make up the title to the property, they are governed by the same rules and limitations which have been laid down above as governing easements rather than regulated by the broader law of rents. When this became settled it is probably impossible to tell. The early Year Books are full of examples of actions of covenant to enforce the collection of rents. The first cases of covenants for distinct obligations are Y. B. 21 E. I, 182, Y. B. 4 E. III, 57, and Pakenham's Case, Y. B. 42 E. III, 3, the former coming before the court again in Y. B. 7 E. III, 65.

Now Pakenham's Case recognized the active obligation as a right in gross, but the other case, decided both before and after Pakenham's Case, required such an obligation to run with land. Since then covenants have been regarded as a separate obligation, and have been attached to other lands. Active easements have been declared impossible,[22] and any right in their nature spurious; and the interrelation between easements, profits, and rents has been ignored. The fact therefore that profits *à prendre*, standing midway between easements and rents, may be created in gross in the common law is interesting.[23] It cannot

[21] SIMS, COVENANTS, p. 60.

[22] "The right conferred by an easement attaches upon the soil of the servient tenement; the utmost extent of the obligation imposed upon the owner being not to alter the state of it so as to interfere with the enjoyment of the easement by the dominant." GALE, EASEMENTS, p. 7, citing Taylor *v.* Whitehead, 2 Dong. 745; Pomfret *v.* Ricroft, 1 Sound. 321. And see GODDARD, EASEMENTS, p. 20.

[23] Gale says that easements cannot be in gross, though profits may

of course be denied that this right of profits *à prendre* and the much fuller rights connected with rents are inconsistent with all theory. Neither a rent reserved from an estate in fee nor a rent granted, nor a rent charge should be created or assignable in gross. But it must be remembered that the Statute of Quia Emptores, 13 Ed. I, destroyed subinfeudation, and as a result confused all the relations to tenure. Prior thereto of course all rents reserved out of fee estates, just as rents reserved now on leases, ran with the reversion; and whether rents granted and rents charge when created were assignable or not, we cannot tell; for there are practically no law reports prior to Edward the First, the Year Books beginning with his reign.[24]

The Roman Law, on the other hand, is consistent throughout. It contains no such thing as a covenant which runs with land, nor indeed any active servitude; [25] and while as has been already noted its servitudes embraced both our profits *à prendre* and our easements, neither one of them could be assigned separately from the dominant tenement, if a so-called real servitude,[26] or died with the person if a so-called personal servitude,[27] and what we call charge and a rent granted, were to the Romans unknown.

The length of this examination of easements and servitudes and covenants, is to be regretted but it would seem unavoidable

---

be. (GALE, EASEMENTS, p. 11.) "There can be no such thing according to our law, or according to the Civil Law as what I may term an easement in gross."—Lord Cairns, L. J., in Mounsey *v.* Ismay, 3 H. & C. at page 498; and see Thorpe *v.* Brumfill, L. R. 8 Ch. 650, decided in 1873.

[24] Bracton, Book IV, C. 16, 6, in discussing the view, says "But if rent, then let the jurors have a view of the tenement whence the rent proceeds. But the rent ought to proceed from a chamber in perpetuity or for a time, a view cannot be held of any tenement." This is apparently his only reference to rent as a separate form of property from the tenement.

[25] See DIGEST 8, 2, 15; and see AUSTIN, LECT. 49, Vol. III, p. 21 *et seq.*

[26] *"Nemo enim protest servitutem acquirere, urbani vel rustice praedie, nisi qui habet praedium"* INST. 2, 3, 3. Cf. CODE CIVIL (FRENCH).

Art 637, to same effect, "a servitude is a charge imposed upon a heritage for the use and advantage of a heritage belonging to another proprietor."

[27] AUSTIN, LECTURE, 50, Vol. III, p. 36, citing MAKELDAY Vol. II, pp. 79-80, evidently the German edition. In the ENGLISH (Phila. 1883) the reference is evidently to § 305.

in gaining a systematic acquaintance with the relation of recognized rights created by the parties to that other division of rights, namely the rights created and imposed by law.

These rights, too, are a growth, and like the former, have grown up, many of them only as the contact between man and man caused their recognition, without regard to their relation to any common principle, and sometimes giving rise to apparent inconsistency.

But from the very fact that they could not be separated from the bundle of rights by act of the parties, and their form and extent thus modified by whim, they will give much less trouble; and their common principle if established will be the more satisfactory, because it must be a principle of social contact belonging to all men in common. The rights of this class commonly met with in every day law are those rights designated by the late common lawyers as natural rights, being the right of lateral support to land, the right to air, and the right to running water, to which may be added the more or less questionable right of natural grade, and that broad right to the peaceful enjoyment of one's own the interference with which is termed a nuisance.

It has not been generally recognized, if indeed it has been hitherto even claimed, that all these rights rest upon one principle. But it has been urged in the preceding article that they do rest upon the general principle that one must limit his enjoyment of his own so as not to interfere with the reasonable enjoyment of others; and now before discussing the history of each of these rights it is necessary to identify this principle in its relation to each of these rights and then show that neither this principle nor any of these particular rights developed limitations really in conflict with our general conception of real property rights.

To begin with it is apparent that rights granted or imposed by law are necessarily inseparable from the bundle. It is true that they can be destroyed by act of the parties. A can contract with B that B shall not be liable to A for digging down his own land not supporting A's land or for rendering A's home unhabitable by the operation of a machine shop on B's land. But A's rights, so capable of destruction by contract cannot be assigned

to B, although B can be released by A from their operation. This non-assignability is not peculiar to these rights, however, for certain restrictive easements and limitations upon use created by the parties are also of the same nature. That fact is immaterial, however, to the present classification. Again it must be seen that each of these rights granted by law is really negative in its nature. It is only a restriction imposed upon the uses or enjoyment of neighboring property relative to each other. This will not be disputed so far as concerns that right of peaceable enjoyment each man shall have of his property the interference with which constitutes a nuisance, for the very statement of the right is conclusive of its negative character. But it may be a surprise to hear the notion posited as to the so-called natural rights to support and to air and water.

The shortest reflection, however, suffices to see that the right to the support by land to land, is the right that your neighbor shall not lower his land so to imperil yours. And the rights to air and water are the rights to those elements which will undoubtedly come to one on his own land in all the purety of nature if his neighbor does nothing to prevent their coming. And the same is true in the case of the right of natural grade. Then all land has these rights inhering in it, and they lie dormant until they are interfered with. So the question is reduced to whether there is any principle under which all infringements of these rights must come. And in casting about we find that the maxim, 'so use your own land as not to interfere with the reasonable use by your neighbor of his', will cover all the infringements.

That maxim has long been the principle of determining whether certain acts constituted private nuisances, which usually involve the right to air. And it is involved in the basis of the law of running waters. While no one can doubt that every land owner is entitled to have his land remain in a shape for use of some sort; which it could not do if his neighbor removes its support so that it caves. Degree will be taken up later in the detailed discussion of the subject. And finally it is believed that the right of natural grade, if it exists at all as a right in the common law, must depend upon the reasonableness with which it applies to a particular case.

The fact that these rights have arisen separately as men's occupations brought them more and more into contact; and that the recognition of some of them was only lately accomplished by all the courts, makes it the more certain that the principle is thorough-going, and makes it easy to believe that it is the key to the proper decision of future cases. Moreover the mere statement of the maxim shows that it is thoroughly in accord with any general system of recognized property rights. Granted that every title is but a bundle of rights, the principle that each bundle of rights must be regarded in the circumstances in which it stands with regard to others, is the essential systematization of the whole. And that means order and law. It reduces law from a series of accidents to a science which should be the aim of every student.

But strange to say the principle in question, although oftenest seen in its Latin clothing of *sic utere tuo ut alienum non laedas*, seems to be entirely a child of the Common Law. In the first article its origin was noted as of Lord Coke's time, although its earlier prototype was pointed out as conceived by Bracton when he said *"prohibetur ne quis faciat in suo per quod nocere posset vicino."*

There is no evidence however that Bracton imbibed the principle from his civil law masters; and all search in the books for evidence of its recognition by the Romans as a working principle has been in vain.[28] That this absence is due to the early and

[28] The Roman conception of real property is thus given by Makelday in his Hand Book of the Roman Law, § 266.—"Property in its nature is an unlimited and exclusive right. It may, however, be restricted in either of these respects without the owner ceasing to be owner." When the owner possesses all the rights inherent in property, and his free exercise of them is not obstructed by any right of another in the same thing, it is a full and free property, *proprietas plena* (*Dominium plenum*). But on the contrary, when the whole right of using the thing is separated from the ownership and pertains to another as a real right, the right remaining in the owner is termed naked property, *nuda proprietas* (*dominium minas plenum*). Property may also be restricted by various other rights in the thing (*jura in re*) belonging to others than the owner. In cases of this kind it is limited or burdened property."

And again § 294, "Property is in its nature an unlimited and exclusive right. (A.) By virtue of its unlimitedness the owner of the

repeated codification of Roman Law is beyond doubt. The Roman lawyers like our students of recent codes of procedure today were to a great extent reduced to the consideration of the letter of the law. And with all due regard to the grandeur of the Code Civil and other compilations by neighboring nations, we may be grateful that some of the most difficult problems of social contact have come down to us untouched by legislation until we can frame them in accord with the light of a few more centuries of learning.

Henry Upson Sims.

BIRMINGHAM, ALABAMA.

---

thing is authorized to dispose of its substance according to his will, and even to destroy it. He has the right to possess the thing, to enjoy it, and to make every lawful use of it, even though such use should produce injury to another. (Citing below.) According to the general principle, he who exercises his right injures no one (*qui jure suo ulitur, neminem lacdit*).